NO. 50663-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

KENNETH JENSEN,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable George Bowden, Judge

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# BRIEF OF APPELLANT

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RULES. STATUTES AND OTHERS

A. ASSIGNMENTS OF ERROR

1. The trial court erred by entering a judgment and sentence for a felony murder conviction based on a second degree assault, an offense that has been invalidated by the Washington Supreme court in In re Personal Restraint of Andress, infra.

2. The trial court erred by instructing the jury that appellant had no right to repel a threatened assault by the use of a deadly weapon if it appeared that only an ordinary battery was intended. CP 42 (Instruction 16). Relevant instructions are attached in appendix A.

3. The trial court erred in responding to a jury inquiry. CP 23 (attached as appendix B).

4. The trial court erred by denying appellant's motion in limine to prevent the state from arguing that he had a duty to warn his attacker before using force in self-defense.

Issues Related to Assignments of Error

1. Should this Court vacate appellant's second degree felony murder conviction and dismiss the charge with prejudice, where: (a) the state charged only second-degree felony murder based on second-degree assault, (b) the Washington Supreme Court held in Andress that conviction for such an offense cannot stand, and (c) there are no other lawful proceedings that would permit the state to file other charges?

2. In a case of felony murder based on a second-degree assault where a deadly weapon was used, the state proposed and the trial court gave a

self-defense instruction that required the jury to find that appellant feared great personal injury and that his attacker intended more than an ordinary battery. Did the trial court err by misstating the law in giving an instruction that impermissibly restricted the definition of great personal injury to exclude injuries caused by an ordinary battery?

3. Did the trial court's erroneous instruction, and the court's response to a jury inquiry, constitute prejudicial error and an unconstitutional comment on the evidence?

4. The trial court rejected the state's proposed instruction that appellant had a duty to warn his attacker before using force, but denied appellant's motion in limine to prevent the state from arguing that appellant had such a duty to warn. Did the trial court err by so ruling, and thereby allow the jury to conclude that a warning was a reasonable alternative to the use of force despite the fact that the law requires no such duty to warn?

B. STATEMENT OF THE CASE

1. Procedural History

On August 28, 2001, the Snohomish County prosecutor charged appellant Kenneth Jensen with one count of second-degree murder arising from the death of Martin Frank in the course of an alleged second-degree assault. CP 90. Jensen raised a claim of self-defense. The state proceeded to trial, but the jury was unable to reach a verdict. Supp. CP ___ (sub no. 49, verdict form A). The trial court declared a mistrial and the state tried the case a second time. Supp. CP ___ (sub no. 46, trial minutes). After three days of deliberation, a jury found him guilty as charged, CP 21, and returned a special verdict finding that he had a firearm at the time the crime was committed. CP 20. The trial court sentenced Jensen to 195 months in confinement, including 60 months for the firearm enhancement. Jensen had no criminal history and a standard range of 183-280 months. CP 71-19. Jensen appeals. CP 6.

2. Substantive Facts

Kenneth Jensen and Martin Frank were neighbors in the Granite Falls area. Jensen, a 58-year-old man, lived a few houses down the street from Frank, who was 40. For two years, Frank continually harassed Jensen with verbal insults and threats and other intimidating behavior.

The harassment began in August of 1999, when Jensen was directed by the postal service to move his mailbox in front of Frank's house because the mail truck could not access it from his house. RP 422-23. Apparently this bothered Frank, RP 165, and a few days after Jensen moved the mailbox, he

was in his car retrieving his mail when Frank drove up and called him a "fucking idiot." RP 424. From that point on, Frank continued to verbally harass Jensen at his mailbox, calling him names like "faggot, cocksucker, dicklicker," RP 426, and would sometimes even block his path. RP 424. On other occasions, Frank drove up in his car while Jensen was either on foot or on his bike retrieving his mail, and rode him off the road. RP 436-38.

On one particular occasion, Jensen was in his truck when he went to retrieve his mail and Frank appeared in Jensen's window, challenging him to "settle this." RP 428. Fearing that Frank was going to lunge through the window or open the car door and come after him, Jensen pulled out a pistol and pointed it over Frank's head. RP 429. Frank did not appear frightened by the display of the gun and told Jensen to "go ahead and shoot." RP 430. Jensen eventually put the gun down, drove away and reported the incident to the police. RP 430-31.

Frank continued to harass Jensen at his mailbox and even threatened Jensen to come over and "get his ass kicked." RP 428. These encounters ultimately forced Jensen to move his mailbox, which required him to construct a turn around for the mail truck to access it. RP 432. Nonetheless, Frank's harassment continued whenever the two encountered one another. After five months of harassment, Jensen eventually started responding to Frank's intimidation with comments like, "You should be on Ritalin," or "You should see a shrink." RP 427.

Frank also had an ongoing feud with the neighbors who owned the

property behind him, Julius Hodges and Wesley Grigg. Hodges and Grigg subdivided the property and each built a house. RP 377. Frank was apparently upset over the large residence Hodges was building on the property because he believed it did not conform to the single family residence zoning in the area. RP 149. Frank harassed them continually, making profane remarks and threats toward them, and even brandished a shotgun while out in his yard. 354-361. On one occasion Frank told Grigg to "go up to the red bridge so he could blow his f--ing head off and do away with our problems once and for all." RP 383. Frank's behavior was so intimidating that Hodges was afraid to work in his yard. RP 361.

Frank also intentionally blocked their driveway with his truck. RP 378-79. This blocking became so obstructive that Hodges and Griggs were forced to post no trespassing signs on their property to prevent Frank from blocking their access. RP 394. Frank responded by posting his own sign that stated trespassers "will be shot." RP 154. Hodges and Grigg ultimately obtained restraining orders against Frank, but the orders were never enforced. RP 387-391.

Jensen often rode his bike to visit Hodges and Griggs and they all related to each other their problems with Frank. RP 447-454. In order to reach Hodges and Griggs' house, Jensen had to ride past Frank's house. RP 423. If Frank was out, he would harass Jensen and Jensen would yell back one of his comments about needing Ritalin or seeing a shrink. RP 435. On one occasion, Frank stood out on his front porch with a shotgun and stared at

Jensen as he rode by. RP 437.

One day as Jensen was riding his bike to Grigg's house, he saw Frank out in his yard. At some point Jensen told Frank he "should see a shrink," and Frank called him a "moron." RP 459. Jensen then rode on to Grigg's house. When he discovered that Grigg was not home, Jensen turned around to ride home. RP 464.

On the way back, he had to pass Frank again. As he was riding by, Frank stepped in Jensen's path, grabbed the handlebars and stopped the bike. RP 467. Jensen then "lurched off the seat" and thought Frank was going to assault him. RP 468. Frank then said "I'm going to end it here and now," and "Go ahead, pull the gun." RP 470.

Jensen tried to pull away, but Frank pulled on the bike, rocking it from side to side. RP 470. Frank then suddenly jerked the bike to one side, put his weight on the handlebars, leaned into it and shoved the bike over. RP 471. Jensen lost his balance and on his way down, without aiming, he fired one shot from a pistol that was inside a leather pouch he wore. RP 473-74. Frank fell to the ground. Jensen immediately pedaled directly to the police station where he turned himself in and told police that he shot Frank. RP 476.

Frank died as a result of the gunshot and the state charged Jensen with second degree felony murder based on the assault with the gun. CP 90. Jensen asserted a claim of self-defense and the jury was unable to reach a verdict in his first trial. Supp. CP ___ (sub no. 49, verdict form). The state proceeded with a second trial, which is the basis for this appeal.

3. Trial Testimony and the Court's Self-Defense Instructions.

At the second trial, the state presented the testimony of three other neighbors, Daniel West, Clinton Burke, and Shuston Smith, who were the only witnesses to the incident. West testified that he saw Jensen riding his bike and that Jensen and Frank were exchanging words. RP 69. According to West, Frank asked Jensen why he was riding in front of his house and Jensen said something like, "You're psycho." RP 70. West then testified that Frank then walked up to the bike and grabbed the handlebars standing in front of the bike and stopping it. RP 70. West also testified that Frank could have been trying to throw the bike to the ground, and that Jensen started to fall off the side of the bike. RP 71, 80, 83. West did not see any weapon on Jensen, but just heard a shot and saw Frank fall to the ground. RP 71-72.

Clinton Burke was with West at the time and testified that he heard Jensen telling Frank that he was crazy and then saw Frank holding onto the handlebars of Jensen's bike. RP 90. Burke also testified that it looked like Frank was not going to allow Jensen to pass and that he heard but did not see the gunshot. RP 92, 99.

Shuston Smith was a 13-year-old girl who lived behind Frank. RP 101. She had seen Jensen ride his bike to Grigg's house earlier that day and saw him yelling with Frank before he went to Grigg's house. RP 102. She testified that she saw Jensen get off of his bike and argue with Frank and that Frank pushed the bike to the ground and then Jensen said "That's it," and shot Frank. RP 105. She also testified that it looked like Frank was going to hit Jensen and

that Frank tried to throw the bike to the ground and that was when she heard the shot. RP 110-11.

The state presented no other eyewitness testimony. The state's remaining case consisted of Frank's wife, who heard the gunshot; the investigating police officers and forensic scientists; and another neighbor, Aaron Tregoning, who was a friend of Frank and a former tenant of Jensen. Tregoning testified that Jensen told him that he did not like Frank on his property visiting Tregoning and threatened to raise his rent. RP 121. Tregoning also testified that he went target shooting with Jensen and that Jensen told him that he "shot from the hip" so if he were in a confrontation, "he would make sure they were that close," and "would have a two second drop on them." RP 121. According to Tregoning, Jensen stated this in reference to Frank. RP 121.

In his defense, Jensen called Hodges, Grigg, and another neighbor, Ruth Deram, who all testified to Frank's harassment, threats and other intimidating behavior. Jensen also testified on his own behalf. He admitted to firing the one shot but asserted that he did not intend to kill Frank but did so in self-defense.

Jensen first detailed the two years of harassment that he endured from Frank. RP 422-438. He also testified that he owned a gun for which he had permit, RP 431, and that he had the gun originally to protect himself from a man who had earlier trespassed on his property. RP 456-58. He carried the gun in a leather pouch that he wore on his body. RP 456. Jensen also testified

that he did ask Tregoning not to bring Frank on his property, and that he did ask Tregoning to begin paying full rent as Jensen had earlier discounted his rent because Tregoning was having financial difficulties. RP 439, 441-42. Jensen denied ever making the comments about "shooting from the hip" so he could "get the drop on Frank." RP 444.

As to the day of the shooting, Jensen testified that when Frank was rocking his bike from side to side, he was so scared that he could not speak. RP 471. Jensen also testified that once Frank shoved the bike over, he lost his balance and fired the gun at that point because he thought he would not have had a chance to defend himself after that moment. RP 473. Jensen did not aim and was not trying to get the gun out. RP 473-74. Rather, he knew he was on his way down to the ground and just had his hand on the gun in the leather pouch hoping to hit Frank somewhere. RP 473. Jensen also testified that he felt there was no way he could have gotten away from Frank and that he feared great bodily harm. RP 473-74.

The trial court gave the following jury instructions regarding self-defense and the use of lawful force. Instruction 12 states:

> It is a defense to the charge that the force used was lawful as defined in this instruction.
>
> The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person or a malicious trespass or other malicious interference with real or personal property lawfully in that person's possession, and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The state has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the state has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 38. Instruction 13 states:

Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

CP 39. Instruction 14 states:

A person is entitled to act on appearance in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of great personal injury, although it afterwards might develop that the person was mistaken as to the extent of the danger.
Actual danger is not necessary for the use of force to be lawful.

CP 40. Instruction 16 states:

One has the right to use force only to the extent of what appears to be the apparent imminent danger at the time. However, when there is no reasonable ground for the person attacked or apparently under attack to believe that his person is in imminent danger of death or great personal injury, and it appears to him that only an ordinary battery is intended, he has no right to repel a threatened assault by the use of a deadly weapon in a deadly manner.

CP 42. Instruction 17 defines great personal injury:

> "Great personal injury" means an injury that the defendant reasonably believed, in light of all the facts and circumstances known at the time, would produce severe pain and suffering if it were inflicted upon either the defendant or another person.

CP 43.

C. ARGUMENT

1. VACATION OF THE CONVICTION AND DISMISSAL OF THE CHARGE IS REQUIRED BY ANDRESS AND CONTROLLING WASHINGTON AUTHORITY.

The state charged Jensen with second degree felony murder based on the predicate felony of second degree assault. The state decided not to charge intentional murder as an alternative. CP 90 (citing RCW 9A.32.050(1)(b)).[1] The to-convict instruction included only the elements of second degree felony murder. CP 33 (instruction 7). The jury found Jensen guilty of that offense alone. CP 21.

In October 2002, the Washington Supreme Court addressed the law governing convictions for felony murder predicated on second degree assault. In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002). In Andress, the court held that second degree assault cannot be the predicate felony for a second degree felony murder conviction. Andress, 147 Wn.2d at

[1] Given the weakness of the case, as shown by the state's difficulty in proving even the felony murder theory in the first trial (where the jury voted 9-3 in favor of acquittal), it is not surprising the state chose not to try to prove intentional murder.

604, 616. The court held that Andress' conviction was a "fundamental defect which inherently results in a complete miscarriage of justice" and accordingly vacated Andress' conviction. Id., at 605, 616.

The state moved for reconsideration, arguing that the court's decision would require reversal of numerous convictions. On March 14, 2003, despite the state's well-orchestrated and highly publicized media campaign, the Supreme Court denied the motion to reconsider. The court again vacated Andress' conviction and remanded for further proceedings, clarifying the remedy by noting that the state was not precluded from "further, lawful proceedings" on remand. Andress, 147 Wn.2d at 616 n.5.

Applied here, the Andress holding requires the vacation of Jensen's conviction for second degree murder. Indeed, in its motion to reconsider in Andress, the state has already recognized that Andress requires vacation of Jensen's conviction.

The state's motion in Andress stated, in part, that "[a]ny person convicted of that crime[2] was convicted of a non-existent crime and is apparently entitled to relief from judgment." Motion, at 3. The motion further stated that its survey of Washington counties had determined numerous cases "that the Andress decision will affect[.]" Motion, at 7 (emphasis added). Attached to the state's motion were declarations from numerous Washington prosecutors; the declaration of Seth A. Fine, from the Snohomish County prosecutor's office, included Jensen's case as one that would be affected by Andress. See appendix C.[3]

Jensen agrees with the state's assertion that his case is one affected by Andress. The only remaining question is whether there are any "further, lawful proceedings" the state might pursue on remand. Because no such proceedings can be pursued, Jensen seeks vacation of the judgment and sentence and dismissal of the charge with prejudice.

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[2] Second degree felony murder predicated on second degree assault.

[3] For the Court's convenience, a copy of the motion to reconsider in Andress is being filed under separate cover. Because the motion was a public pleading and its existence is not subject to reasonable dispute, this Court can take judicial notice of it. See generally, ER 201(b)(2); Tegland, 5 Wash. Pract. Evidence, § 201.17 (4th ed. 1999); State v. Perkins, 32 Wn.2d 810, 872, 204 P.2d 207 (1949).

In response, the state may claim that the jury found all the elements of second degree assault in entering its verdict, so this Court could direct entry of judgment for that offense.[4] Several obvious problems require rejection of such a response. First, the information provided Jennings with no notice of the elements of second degree assault,[5] and a person cannot be convicted of an offense not charged. U.S. Const. amend. 6; Const. art. 1, § 22; State v. Dallas, 126 Wn.2d 324, 892 P.2d 1082 (1995); State v. Pelkey, 109 Wn.2d 484, 489, 745 P.2d 854 (1987); State v. Anderson, 96 Wn.2d 739, 638 P.2d 1205, cert. denied, 459 U.S. 842 (1982). Second, Washington case law makes it clear that there are no lesser included or inferior degree offenses of felony murder, so no notice of the elements of second degree assault or manslaughter was provided under RCW 10.61.003, 10.61.006, or 10.61.010. See State v. Tamalini, 134 Wn.2d 725, 953 P.2d 450 (1998) (felony murder has no lesser included or inferior degree offenses).

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[4] See, e.g., State v. Gilbert, 68 Wn. App. 379, 387-88, 842 P.2d 1029 (1993) (vacating residential burglary conviction but remanding for entry of judgment on the lesser included offense of second degree burglary).

[5] CP 90; see State v. Hartz, 65 Wn. App. 351, 828 P.2d 618 (1992) (the information need not include the elements of the predicate felony).

The state may also creatively assert that it should get a second bite at the charging apple, and this time try charging manslaughter or perhaps even second degree intentional murder. This potential response lacks merit, as the state failed to join any other offense, even though it clearly had every opportunity and all necessary evidence. "Under the mandatory joinder rule, two or more offenses must be joined if they are related. Offenses are related if they are within the jurisdiction and venue of the same court and are based on the same conduct." State v. Watson, 146 Wn.2d 947, 957, 51 P.3d 66 (2002) (citing CrR 4.3.1(b)(1)). Because subsequent amendment of the information would be barred by the mandatory joinder provisions of CrR 4.3.1(b)(3), dismissal with prejudice is required. State v. Dallas, 126 Wn.2d at 331-33; State v. Pelkey, 109 Wn.2d at 491; State v. Anderson, 96 Wn.2d at 740-41.

For these reasons, Jensen asks this Court to vacate his conviction as required by Andress and to dismiss the charge against him with prejudice.[6]

2. THE SELF-DEFENSE INSTRUCTION MISSTATED THE LAW AND IMPOSED A GREATER BURDEN THAN WAS REQUIRED FOR JENSEN TO ASSERT HIS SELF-DEFENSE CLAIM.

The trial court's self-defense instruction included language that misstated the law and misled the jury. Specifically, instruction 16, which required Jensen to show that he anticipated more than an "ordinary battery," misstated the legal standard by which his conduct was to be assessed. By so

[6] The Court need only address the remaining instructional errors in arguments 2 and 3, infra, if the charge is not dismissed with prejudice. The errors should not be repeated if there is a retrial.

instructing the jury, the trial court impermissibly placed a greater burden than was required for Jensen to assert his self-defense claim. The trial court's erroneous instruction requires reversal because it foreclosed Jensen's ability to argue the critical issue in this case: the reasonableness of his use of force.

"Jury instructions on self-defense must more than adequately convey the law." State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997); State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). They must make the relevant legal standard manifestly apparent to the average juror. Walden, 128 Wn.2d at 473; State v. Painter, 27 Wn. App. 708, 713, 620 P.2d 1001 (1980), review denied, 95 Wn.2d 1008 (1981). If a jury instruction misstates the law of self-defense it amounts to an error of constitutional magnitude and is presumed prejudicial. Walden, 128 Wn.2d at 473.

The state bears the burden of proving beyond a reasonable doubt that a defendant did not act in self-defense. State v. Acosta, 101 Wn.2d 612, 618, 683 P.2d 1069 (1984); State v. Irons, 101 Wn. App. 544, 549, 4 P.3d 174 (2000). One may only use deadly force in self-defense if one reasonably believes he or she is threatened with death or "great personal injury." Walden, 128 Wn.2d at 473 (citing RCW 9A.16.050(10)). The jury must evaluate evidence of self-defense by both a subjective and objective standard. The jury must first stand in the shoes of the defendant and consider all the facts and circumstances known to the defendant, and then use this information to determine what a reasonably prudent person similarly situated would have done. Id. at 474.

The trial court erred by giving instruction 16 because it imposed a higher standard for asserting self-defense by requiring Jensen to show that he feared more than an ordinary battery. The state proposed this instruction, which was not a Washington Pattern Jury Instruction. The authority cited by the state in support of the instruction was State v. Walden, 131 Wn.2d 469. Supp. CP __ (sub no. 97, Plaintiff's Proposed Jury Instructions). Defense counsel objected to the instruction, RP 576-77, but the trial court ruled that it was appropriate, noting that it was approved by the court in Walden. RP 577.

In Walden, the defendant was on his bike when others pushed him off his bike and "were looking to beat him up." 131 Wn.2d at 471. He then pulled a knife and was charged with second degree assault. He asserted self-defense and the trial court gave an instruction identical to instruction 16.[7] Id. at 472. But that instruction also included a definition of great bodily injury that stated: "great bodily injury as used in this instruction means injury of a graver and more serious nature than an ordinary battery with a fist or pounding with the hand; it is an injury of such nature as to produce severe pain, suffering and injury." Id. On appeal, the Washington Supreme Court reversed and remanded, holding that the definition of great bodily harm was a misstatement of the law and was therefore presumed prejudicial. Id. at 478-79.

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[7] The instruction in Walden used the term "great bodily injury" instead of "great personal injury." "Great personal injury" is the correct language. See Walden, id. at 475 n.3 (noting that the WPIC comments recommend using "great personal injury" instead of "great bodily harm" in the context of self-defense because "great bodily injury" is a term to be used only in first degree assault cases).

While the Walden opinion did state that the first paragraph of the instruction was adequate, id. at 476, the court's reasoning in support of its ultimate holding runs entirely contrary to such a statement. Walden held that the trial court's definition of great bodily injury could have impermissibly restricted the jury from considering Walden's subjective beliefs about the possible consequences of an assault by the others. Id. at 473.

The Walden court first noted that deadly force may only be used in self-defense if the defendant reasonably believes he or she is threatened with death or great personal injury. Id. at 474. But as the court then held,

> by defining [great personal injury] to exclude ordinary batteries, a reasonable juror could read the instruction 18 to prohibit consideration of the defendant's subjective impressions of all the facts and circumstances, i.e. whether the defendant reasonably believed the battery at issue would result in great personal injury.

Id. at 477. The court went on to approve the definition in WPIC 2.04.01 as "the proper definition to use in defining great personal injury in jury instructions on the reasonable use of force in self-defense." Id. at 478.[8]

Thus, by its own words, the court held that "defining great personal injury to exclude ordinary batteries" was improper. Id. at 477. This is precisely what the instruction here did: it stated that in order to use a deadly weapon one must reasonably believe that his person is in danger of great

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[8] That instruction was given in Jensen's case. Instruction 17 defines great personal injury as "an injury that would produce severe pain and suffering." CP 43.

personal injury and that an ordinary battery is not intended.[9] Thus, as worded, the instruction would not allow the jury to find that Jensen had a right to use a deadly weapon if he reasonably believed he was in danger of great personal injury but also believed that that great personal injury would occur as a result of an ordinary battery.

Moreover, instruction 16 conflicts with instruction 14, which states that Jensen is entitled to act on appearances in defending himself if he believes that he is in actual danger of great personal injury even though it afterwards may develop that he was mistaken as to the extent of danger. Thus, according to this instruction, he need only believe that he was in danger of great personal injury, which is defined in instruction 17 as "an injury that would produce severe pain and suffering." CP 43. There is nothing in either instruction that states that such an injury could not result from an ordinary battery. Instruction 16, however, effectively defined great personal injury as one not caused by an ordinary battery, instructing the jury that Jensen could not use a deadly weapon unless he reasonably believed he was under threat of great personal injury and was not responding to an ordinary battery.

The confusion created by these conflicting and erroneous instructions is evidenced by a jury question asking to define "ordinary battery." CP 23. The

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[9] The instruction's awkward wording in the negative -- "where there is no reasonable ground . . . to believe that his person is in imminent danger of . . . great personal injury, and it appears to him that only an ordinary battery is intended, he has no right to repel . . . by the use of a deadly weapon . . . -- only adds to the confusion.

jury was obviously confused as to whether it had to find that Frank's actions amounted to more than an ordinary battery in order to find that Jensen reasonably believed he was in danger of great personal injury and was therefore entitled to respond with a deadly weapon. The trial court's definition further complicated the issue. The court defined "ordinary battery" as "any intentional and unpermitted touching, striking or hitting of another person that is harmful or offensive, regardless of whether any actual physical injury is done to the person." CP 23.

Thus, reading this definition and the instruction together, the jury had to find that Jensen was not entitled to use his gun if he believed he was going to be intentionally touched, struck or hit by Frank, even if such physical contact would have resulted in great personal injury to Jensen. In so defining ordinary battery, the trial court removed from the realm of great personal injury any injuries that result from an intentional touching, striking or hitting. This undoubtedly misstated the law.

In State v. Painter, 27 Wn. App. 708, 711-14, 620 P.2d 1001 (1981), the court held that the trial court's definition of great bodily harm in a self-defense instruction that excluded injuries caused by "an ordinary striking with the hands or fists" was improper and prejudicial. By so instructing the jury, the court held that the trial court "injected an impermissible objective standard into the instructions," and commented on the evidence. 27 Wn. App. at 712.

The court concluded that the instruction did not accurately state the law because it did not make the subjective standard of self-defense "manifestly

apparent to the average juror." Id. at 713 (citing State v. Fischer, 23 Wn. App. 756, 759, 598 P.2d 742 (1979)). As the court explained:

> It is well within the realm of common experience that "an ordinary striking with the hands or fists" might inflict serious injury, depending on the size, strength, age, and numerous other factors of the individuals involved. It is for this very reason that the jury must be instructed to interpret the evidence in each case in determining if the defendant had reasonable grounds to fear imminent danger of death or great bodily harm given his or her knowledge and the circumstances at the time of the assault.

Painter, 27 Wn. App. at 713. The court also held that under the facts and circumstances of the case, the instruction was a comment on the evidence in violation of Wash. Const. art. 4, § 16. As the court explained:

> In this case, the only evidence by which the jury could find a justifiable homicide was a threatened striking with hands or fists. By restricting the definition of great bodily harm as it did, the trial court clearly indicated to the jury that the evidence presented at trial was insufficient to support the theory of self-defense.

Id. at 714.

Instruction 16 and the court's response to the inquiry suffer the same flaws: both restricted the definition of great personal injury to exclude the jury's consideration of evidence that Jensen feared a severe injury that could have been caused by a striking or hitting from Frank. Thus, as in Painter, instruction 16 did not adequately convey the subjective standard. Rather, it "clearly indicated to the jury that the evidence presented at trial was insufficient to support his theory of self-defense." See id. at 714.

3. THE ERRONEOUS SELF-DEFENSE INSTRUCTION

WAS PREJUDICIAL AND REQUIRES REVERSAL.

"A jury instruction misstating the law of self-defense amounts an error of constitutional magnitude and is presumed prejudicial." State v. LeFaber, 128 Wn.2d at 900. The "ordinary battery" language in instruction 16 is a misstatement of the law and is therefore presumed prejudicial. See Walden, 131 Wn.2d at 478. Thus, Jensen is entitled to a new trial unless the error can be declared harmless beyond a reasonable doubt. Id. "An instructional error is harmless only if it is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." Id.

Here, the obvious prejudice resulting from the trial court's erroneous instruction was that Jensen was prevented from arguing the central issue in the case: the reasonableness of his actions. This was undoubtedly the linchpin of the state's case: the prosecutor's theme throughout was that Jensen did not have any legal basis to act as he did -- that his use of force far exceeded any danger he may have perceived he was in. Armed with instructions that prevented the jury from considering the fact that Jensen may have reasonably feared that great personal injury would have resulted from an "ordinary battery" inflicted upon him by Frank, the state's case was made. How could Jensen ever argue -- and the jury ever conclude -- that his use of force was reasonable when his subjective beliefs about the harm he feared could not be considered if he also believed that harm would have occurred as a result of an "ordinary battery," i.e. an unwanted striking or hitting that is harmful and

offensive?

Had the erroneous instruction not been given to the jury, the outcome would have most likely been different. The record contains ample evidence that supported Jensen's belief that he was responding to a threat of great personal injury, even if he believed such injury would have occurred as a result of an ordinary battery. Jensen was a 58-year-old man on a bicycle. Frank was a much younger man, who was on foot and totally in control of Jensen as he yanked the bike from underneath him while Jensen was still sitting on it. He most certainly could have seriously injured Jensen by throwing him and the bike to the ground and throwing the bike on him or by thrusting the bike into his crotch.

Jensen also related an earlier incident where Frank stopped him in his car and lunged at him through his window, despite the fact that Jensen displayed his gun. The only thing that prevented a physical attack that time was that Jensen was protected inside his truck and was able to drive away. This time, however, Jensen was a more vulnerable target on a bicycle, and Frank actually physically attacked him. Jensen subjective belief believe that this attack would result in great personal injury was objectively reasonable.

Considering all of these facts and circumstances while standing in Jensen's shoes, a jury could have found that Jensen's use of force was a reasonable response to Frank's attack. He was defenseless on his bike and even the threat of his gun would not deter Frank. Thus, he had no other reasonably effective alternative other than his use of force by firing one shot from his

pistol.

The prejudice of this instruction is further revealed by the fact that it was not given in the first trial and the jury could not reach a verdict on these same facts. See CP 68-87. For all these reasons, the state cannot satisfy its burden to show that the erroneous instruction and erroneous response were harmless beyond a reasonable doubt. This Court should reverse the conviction and remand for a new trial.

4. THE TRIAL COURT'S RULING THAT THE STATE COULD ARGUE THAT JENSEN HAD A DUTY TO WARN FRANK BEFORE USING FORCE AGAINST HIM PERMITTED THE JURY TO IMPROPERLY CONCLUDE THAT WARNING WAS A REASONABLE ALTERNATIVE TO JENSEN'S USE OF FORCE.

The law is well-settled that one is neither required to retreat nor warn his or her assailant before using force in self-defense. State v. Williams, 81 Wn. App. 738, 743-44, 916 P.2d 445 (1996)("Flight, however reasonable an alternative to violence, is not required."); State v. Phillips, 59 Wash. 252, 257, 101 P. 1047 (1910) (requiring one to retreat or give warning before using force in self-defense imposes "a burden which the law does not sanction").

The trial court instructed the jury that there was no duty to retreat, CP 41, and rejected the state's proposed instruction that one has a duty to warn before using force in self-defense. RP 17. Defense counsel moved in limine to prevent the state from arguing that Jensen had such a duty. RP 16. Despite the absence of supporting law, the court permitted such argument, ruling:

> I won't prohibit the state from mentioning what the evidence will show or what the lack of evidence may show in its opening statement. Nor will I preclude the state from arguing about the absence of a warning. . . . [Counsel] are free to argue the facts"

RP 17-18.

The prosecutor then argued in closing that Jensen had a duty to warn

Frank before using force against him:

> What alternative did he have? The instructions talk about necessary. There is [sic] all kinds of things he could have done. He could have started out by saying something like, "I am armed, get away." He could have warned him. He never warned him.

RP 609.

By allowing the state to make this argument, the trial court permitted the jury to infer from Instruction No. 13 (defining "necessary" as "no reasonably effective alternative to the use of force") that self-defense was not available to Jensen because warning Frank would have been more reasonable than his use of force. Thus, the jury could have concluded that a warning was a reasonably effective alternative to the use of force in self-defense and that Jensen's use of force was excessive. This is clearly a misstatement of the law. As noted above, Washington law does not require one to retreat or warn before using self-defense. See Phillips, 59 Wash. at 257; Williams, 81 Wn. App. at 743-44. The trial court's ruling that the state could properly argue that warning Frank was a reasonable alternative available to Jensen was therefore error.

In Williams, the court held that a failure to instruct the jury that there is no duty to retreat is reversible error because the jury could have concluded that retreating was a reasonably effective alternative to the use of force and could have therefore found that defendants' failure to retreat was an excessive use of force. 81 Wn. App. at 744. Similarly, in State v. Wooten, 87 Wn. App. 821, 826, 945 P.2d 1144 (1997), review denied, 134 Wn.2d 1021, 958 P.2d 317

(1998), the court held that the trial court's failure to instruct the jury that the defendant had no duty to retreat required reversal, because it prevented the defendant from fully arguing her theory of self-defense and relieved the State of its burden of disproving her defense. 87 Wn. App. at 825. Again, the court held that a without that instruction, a reasonable juror could have concluded that flight was a reasonable alternative to the defendant's use of force, thereby precluding a finding of self-defense. 87 Wn. App. at 826.

Here, the trial court not only omitted an instruction stating that Jensen had no duty to warn, it in fact allowed the state to legally argue such a theory. Thus, as in Williams and Wooten, the trial court's ruling precluded the jury from finding self-defense because the jury could have concluded that a warning was a reasonable alternative to Jensen's use of force and that Jensen's actions were excessive and therefore did not constitute self-defense. Consequently, Jensen was prevented from fully arguing his theory of self-defense and the state was relieved of its burden of disproving his defense. The trial court's ruling therefore requires reversal. See Wooten, 87 Wn. App. at 825-26; Williams, 81 Wn. App. at 744.

D. CONCLUSION

For the reasons stated in argument 1, this Court should vacate the conviction and dismiss the charge with prejudice. For the reasons stated in arguments 2-4, this Court should reverse the conviction and remand for a new trial.

DATED this _____ day of July, 2003.

Respectfully submitted,
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